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SHOW PROCEEDINGS AND ORDERS DATE: [12/13/88]

CASE NBR: [88100151] CSY STATUS: [ ]
SHORT TITLE: [Pennsylvania ]
VERSUS [Bruder, Thomas ] DATE DOCKETED: [071688]

PAGE: [01]

| DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|
| Jul 18 1988 | | Petition for writ of certiorari filed. |
| Aug 2 1988 | | Order extending time to file response to petition until September 10, 1988. |
| Sep 7 1988 | | Brief of respondent Thomas A. Bruder, Jr. in opposition filed. |
| Sep 14 1988 | | DISTRIBUTED. October 7, 1988 |
| Oct 11 1988 | | REDISTRIBUTED. October 14, 1988 |
| Oct 18 1988 | | REDISTRIBUTED. October 28, 1988 |
| Oct 31 1988 | | Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Marshall. Dissenting opinion by Justice Stevens. Opinion per curiam. |
| Nov 30 1988 | | Mandate issued. |

88-161



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

VS.

THOMAS A. BRUDER, JR.,

Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF PENNSYLVANIA

---

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution require that a field sobriety test consisting of the recitation of the alphabet be preceded by warnings of the individual's rights against self-incrimination.

2. Whether the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution require that brief questioning at a routine traffic stop be preceded by warnings of the individual's rights against self-incrimination.

TABLE OF CONTENTS



APPENDICES

TABLE OF AUTHORITIES

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

THOMAS A. BRUDER, JR.,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

## OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania has been reported at 365 Pa.Super.Ct. 106, 528 A.2d 1385 (1987) and is set forth in full in Appendix A of this Petition.

The opinion of the Court of Common Pleas of Delaware County is reported at 73 Del.Co.Rptr. 485 (1986), and is set forth in full in Appendix C of this Petition.



## STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Superior Court was entered on July 21, 1987. The Pennsylvania Supreme Court refused review of this matter by an Order dated May 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Five, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Six, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been



> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

At approximately 12:50 A.M. on January 19, 1985, Officer Steve Shallis of the Newtown Township Police Department observed Thomas A. Bruder, Jr., driving a motor vehicle which was stopped at a green light for ten to fifteen (10-15) seconds. (N.T. December 17, 1985 p. 8). Bruder's vehicle then proceeded at approximately ten to twenty (10-20) miles per hour on a four-lane divided highway where the speed limit was forty (40) miles per hour, swerving back and forth across the highway with high beams on, despite warnings from oncoming traffic. Bruder drove on and made a right turn at a red light without coming to a stop, turning so widely he was travelling eastbound in the westbound lane. (Id. at 9-11). Officer Shallis then stopped Bruder's vehicle. Before the officer had stopped his police car, Bruder exited his vehicle and was unsteady on his feet, having a difficult time keeping his



balance. He also had difficulty removing his wallet from his pocket, looking for his driver's license, and finding his registration and insurance cards in the glove compartment. (Id. at 1214). He had a strong odor of alcohol on his breath, his eyes were bloodshot and his face was flushed. In response to questioning, Bruder admitted to the officer that he had had a couple of drinks. Bruder, a local businessman, then blurted to Officer Shallis, "You don't know who I am". (Id. at 16). Officer Shallis administered several field sobriety tests to Bruder. Officer Shallis first asked him to recite the alphabet, and then requested that he walk a straight line, heel-to-toe. After Bruder performed poorly on both tests, Officer Shallis placed him under arrest for Driving Under the Influence of Alcohol. Bruder refused to undergo any chemical tests to determine his blood alcohol level, despite being advised of the consequences of such a refusal. (Id. at 17).

Bruder filed Omnibus Pre-trial Motions seeking the suppression of evidence, alleging, inter alia, that certain field sobriety tests were administered without advising him of his Fifth Amendment rights as provided in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d. 694 (1966), and that statements elicited from him without first advising him of his rights against self-incrimination and to counsel violated the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. On June 25, 1985 a hearing was held on the pre-trial motions, at which Bruder raised the above federal constitutional claims. (N.T. June 25, 1985 p. 10-11). On July 26, 1985 the Court denied the pre-trial motions and filed Findings of Fact and Conclusions of Law, which are attached hereto as Appendix B.

On December 17, 1985, Bruder was found guilty of Driving Under the Influence of



Alcohol following a non-jury trial before the Honorable Rita E. Prescott. Bruder filed post-trial motions raising, inter alia, the federal constitutional claims he raised in his pre-trial motions. By an Order dated May 9, 1986 the Court dismissed the post-trial motions, and filed an opinion on May 14, 1986. A copy of that Opinion is attached hereto as Appendix C. On July 23, 1986, he was sentenced to a term of imprisonment of forty-eight (48) hours to six (6) months. Bruder took a direct appeal to the Superior Court of Pennsylvania, which reversed the judgment of sentence and remanded for a new trial in an opinion by a divided panel dated March 30, 1987. A copy of that Opinion is attached hereto as Appendix D. President Judge Cirillo, writing for himself and Senior Judge Hoffman, held (1) the roadside questioning of Bruder was constitutionally infirm due to a lack of Miranda warnings, Appendix at 6a-11a; 51a-56a and

Commonwealth v. Bruder, 365 Pa.Super.Ct. 106, 110-12, 528 A.2d 1385, 1387-88 (1987), and (2) a field sobriety test consisting of the recitation of the alphabet constituted testimonial evidence, which also required Miranda warnings. Appendix at 12a-14a; 57a-59a, and Commonwealth v. Bruder, supra. at 113-14, 528 A.2d at 1388. Judge Rowley filed a concurring and dissenting opinion, voting to affirm the Judgment of Sentence. The Commonwealth filed an Application for Reargument from this determination. The Superior Court, by Order dated June 8, 1987, denied reargument, but took the unusual action of sua sponte ordering panel reconsideration limited to the issue of the sufficiency of the evidence. A copy of that Order is attached hereto as Appendix E. On July 21, 1987 the panel found the evidence presented at trial sufficient to support the verdict, but again reversed the judgment of sentence, Judge Rowley again dissenting. A



copy of that Opinion is attached hereto as Appendix A. The Commonwealth filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. By an Order dated May 19, 1988, the Supreme Court denied the Commonwealth's Petition. A copy of that Order is attached hereto as Appendix F. The Commonwealth now seeks this Court's review of the Superior Court's Opinion and Order.

## REASONS FOR GRANTING THE WRIT

### A. THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION DO NOT REQUIRE THAT A FIELD SOBRIETY TEST CONSISTING OF THE RECITATION OF THE ALPHABET BE PRECEDED BY WARNINGS OF THE INDIVDUAL'S RIGHTS AGAINST SELF-INCRIMINATION.

The Pennsylvania Superior Court has decided a question of federal law[1] in conflict with the applicable decisions of this Court by holding that a field sobriety test consisting of the recitation of the alphabet must be preceded by Miranda[2] warnings. The

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[1] The Superior Court opinion did not base its decision upon the Pennsylvania Constitution, nor did it make a plain statement that its decision was based on independent state grounds. The decision is thus presumed to be based on federal constitutional grounds. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d. 674 (1986).

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).



Superior Court's opinion is based on its holding that the recitation of the alphabet is testimonial in nature. This holding is in direct conflict with the prior decisions of this Court.

In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), this Court held that requiring a defendant to participate in a line-up and speak the words spoken by the perpetrator of the crime did not violate the defendant's right against self-incrimination. The Court concluded that Wade's voice was being used to identify physical characteristics and that he was not being compelled to utter statements of a testimonial nature. In United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), the Court held that compelling voice exemplars does not violate a defendant's privilege against self-incrimination since the voice exemplars were used solely to measure the physical properties of the witness's voice,

not for the testimonial or communicative content of what was to be said.

The Pennsylvania Superior Court, in direct conflict with the holdings of this Court, based its decision solely on the fact the evidence in question came from the defendant's mouth. The Superior Court used an improper analysis. The mere fact that the evidence originated from the defendant's mouth is not the end of the analysis. Self-incrimination protections are only implicated when the evidence is testimonial or communicative. Schmerber v. California, 384 U.S. 757, 86 S.Ct 1826, 16 L.Ed.2d. 908 (1966), and it is the testimonial or communicative nature of the evidence which is the proper inquiry. Since the recitation of the alphabet is designed to test the degree to which a suspect's faculties are impaired, it is a physical test. No communicative value exists at all in the substantive sounds being uttered by the individual. In view of the applicable



decisions of this Court, the Pennsylvania Superior Court erred in concluding otherwise.

The instant matter is an appropriate case for this Court to review inasmuch as the precise issue presented has never been directly addressed by this Court, yet is important, in view of the large number of drunk driving cases occurring nationwide.[3]

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[3] This issue has not been directly addressed by most state courts, but all which have done so have held the recitation of the alphabet to be non-testimonial and not within the purview of the constitutional protections against self-incrimination. State v. Theriault, 144 Ariz. 166, 696 P.2d 718 (1984); People v. Helm, 633 P.2d 1071 (Colo. 1981); Oxholm v. District of Columbia, 464 A.2d 113 (D.C.App. 1983); Montgomery v. State, 174 Ga.App. 95, 329 S.E.2d 166 (1985); State v. Hartwig, 112 Idaho 370, 732 P.2d 339 (1987); People v. Saturday, 482 N.E.2d 1124 (Ill.App.2 Dist. 1985); McAvoy v. State, 70 Md.App. 661, 523 A.2d 618 (1987); People v. Burhans, 421 N.W.2d 285 (Mich.App. 1988); Butler v. Commissioner of Public Safety, 348 N.W.2d 827 (Minn. App. 1984); State v. Medenbach, 48 Ore. App. 133, 616 P.2d 543 (1980); State v. Roadifer, 346 N.W.2d. 438 (S.D. 1984).

B. THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE THAT BRIEF QUESTIONING AT A ROUTINE TRAFFIC STOP BE PRECEDED BY WARNINGS OF THE INDIVIDUAL'S RIGHTS AGAINST SELF-INCRIMINATION.

The Pennsylvania Superior Court's holding that brief roadside questioning of a driver during a routine traffic stop must be preceded by Miranda warnings is in direct conflict with this Court's holding in Berkemer v. McCarty, 468 U.S. 427, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), which held that Miranda warnings are not required in such circumstances. The Superior Court relied upon Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980) in holding that the police should have given Bruder Miranda warings prior to asking him questions during the traffic stop. This Court, however, specifically rejected Commonwealth v. Meyer and its



reasoning Berkemer v. McCarty, supra. at nn.7 and 8.

Since the Pennsylvania Superior Court has ignored the plain holding of Berkemer v. McCarty and instead followed federal law[4] which this Court rejected, it is respectfully submitted that the instant case is appropriate for review by this Court.

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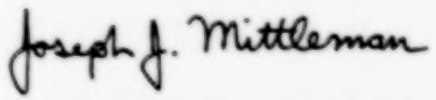
4 See Footnote 1, supra.

## CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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# A P P E N D I X

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02176 Philadelphia 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby Reversed and Remanded for Further Proceedings. Jurisdiction Relinquished.

BY THE COURT:

David A. Szewczak
Prothonotary

Dated: July 21, 1987

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02176 Philadelphia 1986

Appeal from the Judgment of Sentence July 23, 1986 in the Court of Common Pleas of Delaware County, Criminal No. 303 of 1985

BEFORE: CIRILLO, P.J., ROWLEY AND HOFFMAN, JJ.

OPINION BY CIRILLO, P.J.:

This is an appeal from a judgment of sentence, following a non-jury trial, for driving under the influence of alcohol and related offenses. We reverse and remand.

The issues presented for our review are: (1) whether the criminal complaint should have been dismissed due to its defects; (2) whether certain evidence was properly admitted at trial; and (3) whether the verdict was supported by sufficient evidence.

A patrolman stopped appellant Bruder's car after the officer saw him pass a



red light. The patrolman also witnessed what he described as Bruder's erratic driving behavior. When the policeman approached Bruder, he noticed indicia of intoxication. The patrolman testified that Bruder was unable to walk in a straight line, heel to toe, or recite the complete alphabet. Appellant was then arrested for driving under the influence of alcohol, and informed of his rights as required by Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

I

Appellant argues that the complaint filed against him was defective and, therefore, should have been dismissed. More specifically, appellant asserts that the complaint violated Pennsylvania Rules of Criminal Procedure 132 and 134.

The alleged violation by the Commonwealth of Rule 132 was its failure to include a verification with the complaint. Rule 132(9) requires that every complaint include a "verification by the affiant that the

facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties . . . relating to unsworn falsification to authorities . . ."

In the case at bar, the arresting officer, in filing the complaint, used an old form which was designed to conform to an older version of Rule 132. The complaint did not conform to the current version of Rule 132 because it did not contain the required clause that false statements were subject to the penalties of unsworn falsification.

The trial court found that based on Pa. R. Crim P. 150, the defect in the complaint did not warrant dismissal of the charges. Pa. R. Crim P. 150 provides that a "defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, summons or warrant, or a defect in the procedures of this chapter, unless the defendant raises the



defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The trial court noted that the defect concerning the absence of a verification was not raised in this case until after the preliminary hearing and suppression hearing. The trial court also observed, and we agree, that the appellant was aware of the charges against him and was not prejudiced by the defect in the complaint.

We express displeasure with the failure of the police to fully comply with the requisite form of a complaint. The plain language of Rule 150, however, does not permit us to discharge the complaint in this particular case because the defect was neither timely raised nor was it prejudicial to the appellant.

Appellant also contends that Pa. R. Crim. P. 134 was violated. Rule 134 provides that in any proceeding initiated by a complaint, the issuing authority shall

ascertain and certify on the complaint that there is probable cause, in the form of an affidavit, for the issuance of process.

Notwithstanding appellant's assertion to the contrary, we discern no language in the rule, or in the comments to the rule, which require the police to personally appear and verify the complaint before the district justice involved in the case. Because we find no violation of Rule 134, we cannot dismiss the complaint on this basis.

Appellant also argues that the defective complaint was a violation of Pa. R. Crim. P. 130(d). We need not address this argument due to our holding that there were no fatal defects in the instant complaint.

II

Bruder argues that certain statements that he made after he was stopped, as well as the results of the field sobriety test, should have been suppressed.

When appellant's car was stopped,



appellant stepped out and approached the police vehicle. The police officer asked appellant for his driver's license, registration and insurance card. Appellant returned to his car to obtain the requested information. After appellant had provided this information, the police officer asked appellant whether he had been drinking and appellant responded that he had. The police officer also asked appellant where he was going. Appellant responded that he was going home. Bruder argues that these responses should be suppressed because they were made before he was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 479 (1966).

Miranda warnings need be given only when one is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444 (1966); Berkemer v. McCarty, 468 U.S. 420, 428-29 (1984). In order to determine whether the responses made by appellant before he received his Miranda warnings should have been suppressed, we

must decide whether they were elicited during curtodial interrogation.

In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court ruled that a motorist was not in custody when he was stopped by a police officer who asked " a modest number of questions and requested him to perform a simple balancing test visible to passing motorists." 468 U.S. at 442. As in the case at bar, the driver in McCarty, was stopped after being suspected of driving under the influence of alcohol, admitted that he had had a few drinks, and failed a balancing test before being advised of his Miranda rights. The Court in McCarty, however, refused to adopt a bright line test which would have definitively answered the question of whether Miranda applies to all traffic stops or whether a suspect need be adivsed of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been



taken into custody.

In Pennsylvania, "custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted." Commonwealth v. Meyer, 488 Pa. 297, 307, 412 A.2d 517, 521 (1980) (quoting Commonwealth v. Brown, 473 Pa. 562, 570, 375 A.2d 1260, 1264 (1977). Interrogation in this context is defined as questioning "`expected to elicit a confession or other incriminating statements.'" Commonwealth v. Bracey, 501 Pa. 356, 367, 461 A.2d 775, 780 (1983) (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)).

In Commonwealth v. Meyer, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait

at the scene until additional police arrived was in custody for purposes of Miranda. The Meyer court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his Miranda warnings should have been suppressed. 488 Pa. at 307, 412 A.2d at 522. See generally Annotation, Right of Motorist Stopped by Police Officers To Be Informed at That Time of His Federal Constitutional Rights Under Miranda v. Arizona, 25 A.L.R. 3d 1076 (1969) (cases collected).

We rely on Meyer in finding that Bruder reasonably believed that his freedom of action had been restricted. Undoubtedly, he was not free to leave when he made the statements elicited. That the policeman's questions were intended to elicit incriminating statements remains obvious. We cannot readily accept an alternative reason why Bruder was asked if he had been drinking. Thus, based on the reasoning in the Meyer,



case, we conclude that Bruder's response that he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of Miranda warnings. See generally McCarty, 468 U.S. at 441 n.34 (United States Supreme Court cites Meyer in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was a custodial interrogation for purposes of providing Miranda warnings). As we have established that custodial interrogation existed at the point that Bruder was asked whether he had been drinking, the subsequent response concerning his destination should also have been excluded.

Bruder's statement, "You don't know who I am," was admitted into evidence over the objection of counsel. Although this statement was made before Bruder received his Miranda warnings, it was a spontaneous utterance not made in response to a question

by the police officer. In Commonwealth v. Bracey, 501 Pa. 356, 461 A.2d 775 (1983), the Pennsylvania Supreme Court ruled that a statement is admissible notwithstanding the lack of Miranda warnaings if it was not given in response to police conduct which evoked an admission, or if it was freely given without compelling influences. Id. at 367, 461 A.2d at 780 (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)). It is clear from the record that this particular statement by Bruder was freely made in the absence of evocative police conduct. Therefore, it was properly admitted.

After appellant informed the police officer that he had had a few drinks, the police officer asked the appellant to recite the alphabet and to walk in a straight line, heel to toe. Appellant argues that these field sobriety tests should be suppressed. It is settled in Pennsylvania that "(r)equiring a driver to perform physical tests . . .does not violate the privilege against self-incrimination



because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required." Commonwealth v. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980).

Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387. "Testimonial evidence is communicative evidence as distinguished from demonstrative or physical evidence." Commonwealth v. Fernandez, 333 Pa. Super. 279, 284, 482 A.2d 567, 569 (1984).

We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was

elicited before Bruder received his Miranda warnings, it should have been excluded as evidence. Benson, 280, Pa. Super. at 29, 421 A.2d at 387 (citing United Stated v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966)). See Miranda, 384 U.S. at 479.

In order to reverse on the basis of the introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence. Commonwealth v. Sweger, 351 Pa. Super. 188, 195, 505 A.2d 331, 334 (1986) (citing Lewis v. Prewitt, 337 Pa. Super. 419, 487 A.2d 16 (1985)); see also Commonwealthy v. Smoyer, 505 Pa. 83, 88, 476 A.2d 1304, 1307 (1984) (effect of tainted evidence); Commonwealth v. Johnson, 227 Pa. Super. 96, 102-03, 323 A.2d 813, 816 (1974) (same).

Based on our analysis which determined that evidence obtained during Bruder's custodial interrogation was



inadmissible, we hold that it was an abuse of discretion to admit such evidence. Introduction of the tainted evidence was clearly prejudicial to Bruder because the absence of such evidence might very well have led to a different verdict. Thus, we must reverse and remand for proceedings consistent with this opinion.

III

The last issue presented is whether there was sufficient evidence to find appellant guilty of driving under the influence of alcohol, 75 Pa. C.S. §3731.

Our standard of review for this issue is limited. We must "view the evidence in the light most favorable to the Commonwealth (as verdict winner) and, drawing all reasonable inferences therefrom favorable to the Commonwealth, determine if there is sufficient evidence to enable the trier of fact to find every element of the crime beyond a reasonable doubt." Commonwealth v. Stoyke, 504 Pa. 455, 462,

475 A.2d 714, 718 (1984) (citing Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980).

Even though we have determined in part II of this opinion that certain evidence should not have been admitted, we also recognize that when reviewing the sufficiency of the evidence, the "entire record with all evidence actually received must be considered, whether or not the lower court's rulings thereon were correct." Commonwealth v. Minnis, 312 Pa. Super. 53, 55, 458 A.2d 231, 232 (1983). See Commonwealth v. Manhart, 349 Pa. Super. 552, 556, 503 A.2d 986, 988 (1986); see also Commonwealth v. Nelson, 320 Pa. Super. 488, 494, 467 A.2d 638, 641 (1983) (In passing upon the sufficiency of the evidence, we evaluate all of the evidence, whether erroneously received or not. The proper remedy for prejudicial error due to inadmissible evidence is grant of a new trial with such evidence excluded). In Minnis, we found that the record as a whole indicated



that the evidence was sufficient, but we reversed and remanded because we ruled that certain out-of-court identifications should have been suppressed.

We have the benefit of a recent consideration of the sufficiency of evidence in connection with 75 Pa. C.S. §3731, by the Pennsylvania Supreme Court in Commonwealth v. Griscavage, 512 Pa. 540, 517 A.2d 1256 (1986). The sole issue in Griscavage was whether there was sufficient evidence to establish guilt beyond a reasonable doubt on the charge of driving while under the influence of alcohol.

The Court stated that in order to establish the defendant's guilt, "the Commonwealth had to prove: (1) that he was operating a motor vehicle, (2) while under the influence of alcohol to a degree which rendered him incapable of safe driving." Griscavage, 512 Pa. at ___, 517 A.2d at 1258; 75 Pa. C.S. §3731(a)(1) (citations omitted). As in the case before us, there was no dispute in

Griscavage regarding the first element. With respect to the second element, the Court quoted an interpretation of the phrase "under the influence of alcohol," which, though based on a prior statute, is applicable to the current version of §3731(a)(1).

> The statute does not require that a person be drunk, or intoxicated, or unable to drive his automobile safely in traffic, but merely that the Commonwealth prove beyond a reasonable doubt that the defendant was operating his automobile under the influence of intoxicating liquor . . .
> The statutory expression "under the influence of intoxicating liquor" includes not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.



Commonwealth v. Dougherty, 351 Pa. Super. 603, 609, 506 A.2d 936, 939 (1986) (Cirillo, J., now P.J.), we held that the evidence was sufficient to support a conviction under 75 Pa. C.S. §3731 where the defendant was observed operating a motor vehicle that was swerving from side to side. Upon stopping the vehicle in Dougherty, the police noticed the odor of alcohol and an accumulation of alcoholic beverages inside the vehicle. The driver in Dougherty did not perform well in field sobriety tests and had difficulty walking and standing upright without placing his hands on his vehicle. Although in the case before us there was no evidence of an accumulation of alcoholic beverages inside the vehicle, we find that the Dougherty case is substantially similar to the case at bar and we rely on it as a basis for our decision.

Based on our application of Griscavage and Dougherty, and viewing the evidence as a whole in the light most favorable to the Commonwealth, we conclude

Griscavage, 512 Pa. at ___, 517 A.2d at 1258 (emphasis in original) (quoting Commonwealth v. Horn, 395 Pa. 585, 590-91, 150 A.2d 872, 875 (1959)).

In the instant case, the record indicates that appellant had been drinking, had been driving erratically, and had performed poorly in field sobriety tests. The trier of fact concluded that those faculties essential to the safe operation of an automobile were substantially impaired by appellant's drinking.

The Griscavage, case instructs us to consider indicia of intoxication together with the other circumstances surrounding the traffic stop. Based on all the evidence presented in the trial court, these indicia and circumstances support an inference of substantial impairment of faculties sufficient to satisfy the test in Horn.,

We recently upheld a conviction for driving under the influence in a case that was factually similar to the instant case. In



that there was adequate support for finding the appellant guilty of driving under the influence of alcohol. As we discussed earlier, however, and as we did no Minnis, we must still reverse and remand. See Nelson.

Reversed and remanded for proceedings consistent with this opinion. Jurisdiction is relinquished.

ROWLEY, J. files a Concurring and Dissenting Statement.

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2176 Philadelphia 1986

Appeal from the Judgment of Sentence July 23, 1986, in the Court of Common Pleas of Delaware County, Criminal Division, No. 303 of 1985.

BEFORE: CIRILLO, P.J., ROWLEY, and HOFFMAN, JJ.

CONCURRING AND DISSENTING STATEMENT BY ROWLEY, J:

While I agree with the majority's disposition of the first and third issues concerning dismissal of the criminal complaint and sufficiency of the evidence, I respectfully disagree with the conclusion that appellant's statements should have been suppresssed under Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980). I think that Meyer is distinguishable on its facts and that the facts in this case closely parallel those in Berkemer v. McCarty, 468 U.S. 420 (1984). Considering



also that the U.S. Supreme Court cited Meyer as an example of the confusion among various jurisdictions in applying Miranda v. Arizona, 384 U.s. 436 (1966) to situations involving motorists stopped for traffic violations, I think that Berkemer is controlling in this case. I would affirm the judgment of sentence.

IN THE COURT OF COMMON PLEAS OF

DELAWARE COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
vs. NO. 303-85
THOMAS A BRUDER, JR. :

Jana Nestlerode, Esquire-Assistant District Attorney
Court House
Media, PA 19063

Carmen Belefonte, Esquire-Attorney for Defendant
Lawyers Title Building, 214 N. Jackson St.
Media, PA 19063
PRESCOTT, J.
CRIMINAL DIVISION

O R D E R

AND NOW, to wit, this 26th day of July, 1985, a hearing having been held in open Court, pursuant to a Petition to Suppress filed on behalf of the Defendant, at which hearing the Defendant was present with his attorney, and an opportunity having been given the Defendant and his counsel to cross-examine Commonwealth witnesses, and an opportunity having been given to the Defendant to present witnesses and the





Defendant not having taken advantage of this opportunity to either take the witness stand, or to present witnesses in his own behalf which facts do not prejudice his legal rights in any way, the court makes the following:

I. FINDINGS OF FACT

1. On January 19, 1985, at 12:50 A.M. Patrolman Steve Shallis of the Newtown Township Police Department observed a blue over silver Lincoln Continental in the right hand operating lane of Route 252. The vehicle was facing a green traffic signal at the intersection of Routes 252 and 3. It was stationary and remained so for 10-15 seconds before proceeding through the intersection.

2. Officer Shallis followed the subject vehicle as it proceeded north on Route 252 at 25 M.P.H. in a 40 M.P.H. zone. He observed the vehicle swerve into the left hand passing lane, almost going into the medial strip, and then back, onto the right hand shoulder. The operator of the Lincoln activated his high beams, despite visual warnings from vehicles

proceeding in the opposite direction and continued to drive on the shoulder for approximately 100 feet before reentering the highway.

3. As the vehicle approached the intersection of Route 252 and Goshen Road the traffic signal at the intersection displayed a steady red signal. The vehicle continued toward this intersection and, as it began entering the intersection, the operator made an abrupt right hand turn onto Goshen Road, without stopping for the red signal. This turn was made in such a wide manner that the Lincoln was now proceeding eastbound in the west bound lane, and continued to do so for 150 feet.

4. Officer Shallis activated the red lights on his unmarked police vehicle and stopped the Lincoln at Goshen and Brookhaven Roads.

5. The operator of the vehicle exited it, stumbling as he did so, and walked very rapidly to the police vehicle.



6. Officer Shallis advised the operator to produce a driver's license and registration card for the vehicle. The operator turned and walked back toward his vehicle with Officer Shallis following him. The operator had difficulty removing his wallet from his pocket, however he handed Officer Shallis a Florida driver's license which identified him as Thomas A. Bruder, the Defendant.

7. Mr. Bruder informed Officer Shallis that he was going to his home in Springfield. The Officer detected a strong odor of an alcoholic beverage on Mr. Bruder's breath, and observed that his eyes were blood shot and his face was flushed.

8. Officer Shallis asked the Defendant if he could produce a registration card for the vehicle. Mr. Bruder went into the vehicle, opened the glove compartment, removed a large stack of papers and began fumbling through them, passing the registration card several times.

9. Officer Shallis requested that the

Defendant step out of the vehicle and repeated this request three times before the Defendant did so. He asked Mr. Bruder to walk a straight line, heel to toe, six steps forward, and then six steps back. The Defendant was unable to place one foot in front of the other and continued to walk forward for 15 steps until he walked into the police vehicle. As he walked back, Defendant continued to sway from side to side.

10. Officer Shallis asked the Defendant to recite the alphabet out loud. Defendant recited it by stating five or six letters at a time and hesitating before starting again.

11. Officer Shallis advised the Defendant that he was under arrest for operating a vehicle under the influence of alcohol. The defendant was placed in the rear of a police vehicle and was advised of his Miranda rights. Mr. Bruder responded by stating that he understood his rights.

12. The Defendant was transported to the Newtown Township Police Station for



processing. At the Police Station he was again advised of his Miranda rights. Officer Shallis requested Defendant to submit to a chemical test of his breath, blood, or urine to determine the alcohol content of his blood. He advised Mr. Bruder that he had the right to refuse, but that a refusal would result in a 12 months suspension of his operating privilege and that a refusal to submit to a chemical test would be used against Defendant in a court of law. The Defendant refused to submit to any chemical tests, stating that he understood the consequences of such a refusal.

## II. CONCLUSIONS OF LAW

1. The observations made by Officer Shallis as he followed the Defendant's vehicle on January 19, 1985 established sufficient probable cause to stop and administer field sobriety tests to the Defendant.

2. The field sobriety tests administered to the Defendant did not violate any of the Defendant's Constitutional Rights.

3. The statements and responses given by the Defendant were obtained pursuant to lawful inquiries and did not violate any Constitional Rights of the Defendant.

4. The statements and responses given by the Defendant further established probable cause to arrest him.

5. The statements and responses elicited from the Defendant pursuant to the subject sobriety tests and inquiries are legally admissible at his trial subject to relevancy and other laws of evidence.

6. The nature and purpose of the suppression hearing and this Order shall not be disclosed by anyone to anyone, except the Court, the Defendant and Defendant's counsel.

7. The record made at the Suppression hearing shall be impounded until after final judgment.

BY THE COURT:

_____
Rita E. Prescott, J.



IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
303-85
VS. :

THOMAS A BRUDER, JR. :

Joseph J. Mittleman, Esquire-Assistant District Attorney
Court House
Media, PA 19063

Carmen P. Belefonte, Esquire-Attorney for Defendant
214 N. Jackson Street
Media, PA 19063

PRESCOTT, J. Filed:May14,1986

O P I N I O N

Defendant, Thomas A. Bruder, Jr., was convicted by a judge sitting without a jury for the charges of Driving Under the Influence of Alcohol, Reckless Driving and Driving on Roadways Laned for Traffic. Defendant filed a Motion for New Trial and A Motion in Arrest of Judgment. The issues raised by said motions are:

1) Whether the verdict was against the evidence and the weight of the evidence;

2) Whether the criminal complaint lodged against Defendant was so legally defective as to require a dismissal of the charges;

3) Whether certain statements made by Defendant and the results of certain field sobriety tests should have been suppressed where said statements and tests preceded the Miranda warnings given to Defendant.

This opinion is written in disposition of Defendant's post-trial motions and the issues raised therein.

The facts of the case established by testimony and other evidence are as follows:

On January 19, 1985, at or about 12:50 A.M., Patrolman Steve Shallis of the Newtown Township Police DEpartment observed a blue and silver Lincoln Continental in the right hand operating lane of Route 252 at the intersection with West Chester Pike. The vehicle was facing a green traffic signal at said intersection, however, the vehicle was stationary and remained so for about ten to



fifteen seconds before proceeding through the intersection. Officer Shallis followed the subject vehicle as it proceeded north on Route 252. The vehicle was travelling at a speed of 25 m.p.h. in a 40 m.p.h. zone and it swerved into the left hand passing lane, almost hit the medial strip and then went back across onto the right hand shoulder of the road. The operator of the subject vehicle activated his high beams despite visual warnings from vehicles proceeding in the opposite direction and the said vehicle continued to travel on the shoulder of the road for approximately 100 feet before reentering the highway. As the subject vehicle approached the intersection of Route 252 and Goshen Road, the traffic signal at said intersection displayed a steady red signal. The vehicle continued toward the intersection and, as it began entering the intersection, the vehicle made an abrupt right hand turn onto Goshen Road, without stopping for the red signal. The turn was made in such a wide

manner that the subject vehicle was proceeding eastbound in the westbound lane and continued to do so for approximately 150 feet.

At this point, Officer Shallis activated the red lights on his police vehicle and stopped the subject Lincoln at Goshen and Brookhaven Roads. The operator of the Lincoln exited from it, stumbling as he did so, and walked very rapidly toward the police car. Officer Shallis asked the operator to produce a driver's license and a registration card for the Lincoln. Defendant then went into his vehicle, opened the glove compartment, removed a large stack of papers and began fumbling through them, passing the registration card several times.

Defendant was then asked to step out of the vehicle and this request was repeated three times before Defendant complied. Officer Shallis asked Defendant to walk a straight line, heel to toe, six steps forward, and then six steps back. Defendant was



unable to place one foot in front of the other and continued to walk forward for 15 steps until he walked into the police vehicle. As he walked back, Defendant swerved from side to side.

Officer Shallis then requested Defendant to recite the alphabet out loud. Defendant recited it by stating five or six letters at a time and hesitated before starting again. Officer Shallis then advised Defendant that he was under arrest for operating a vehicle under the influence of alcohol. Defendant was placed in the rear of the police vehicle and was given his Miranda rights. Defendant responded by stating that he understood his rights.

Defendant was transported to the Newtown Township police station for processing. While at the station, Defendant was again advised of his Miranda rights. Officer Shallis requested Defendant to submit to a chemical test of his breath, blood or urine to determine the alcoholic content of

his blood. He advised Defendant that he could refuse a test, but that a refusal would result in a twelve month suspension of his operator's license and that a refusal to submit to a chemical test would be used against him in a court of law. Defendant refusal to submit to any chemical test, stating that he understood the consequences of such a refusal.

The first issue raised by Defendant's post-trial motions is: Whether the verdict was against the evidence and the weight of the evidence.

In support of the contention that the verdict was against the evidence, Defendant argues that the trial judge did not take into consideration defense expert testimony that Defendant had taken certain cold tablets, which alone could cause a person to exhibit symptoms of intoxication, and that such was the case here.

This court considered the expert testimony presented by Defendant. However,



this Court rejected such testimony as it was based upon testimony adduced from Defendant which testimony this Court did not find to be credible. Comm. v. Shaver, 501 PA. 167, 460 A.2d 742 (1983).

In addition to all the facts as hereinbefore set forth, this Court relied upon certain other evidence in rejecting Defendant's version of what occurred on the night in question. When taken to the police station, Defendant told the police that he had not been drinking. At trial, Defendant admitted that he had been drinking. (N.T. pp. 25, 75-76). On the night in question, Defendant told the police he was going home, but at trial, Defendant testified that he was going to a country club. (N.T. pp. 24, 79). At the time of his arrest, Defendant told the police that he was not ill, yet at trial, Defendant testified that he was ill that night and felt dizzy. (N.T. pp. 26, 128). Furthermore, Defendant's behavior on the day of his arrest is not consistent with his

testimony that he was feeling ill on the day in question. He had spent six hours at a country club, had several drinks, danced and played cards - after a full day of work.

In light of the Commonwealth's overwhelming evidence as set forth above and viewing said evidence in the light most favorable to the Commonwealth, Comm. vs. Macolino, 503 PA. 201 469 A.2d 132 (1983), this Court is of the opinion that there is legally sufficient evidence on the record to sustain Defendant's guilt beyond a reasonable doubt.

The second issue raised by Defendant is: Whether the criminal complaint lodged against Defendant was so legally defective as to require a dismissal of the charges.

Defendant contends that the criminal complaint filed against him did not contain a verification by the arresting officer that the facts set forth in the complaint were true and correct according to the arresting officer's knowledge, information and belief



and that any false statements in the complaint would be subject to the penalties of Section 4904 of the Crimes Code relating to unsworn falsification. As a result, Defendant contends that the instant complaint is violative of Pa. R. Crim. Proc. 132 and, thus, null and void.

Defendant also contends that since the averments contained in the complaint were not sworn to and subscribed by the arresting officer in the presence of the district justice involved, the complaint is null and void since it is violative of Pa. R. Crim. Proc. 134.

Before proceeding to review the merits of Defendant's contentions, the following factual background is set forth:

Defendant was arrested without a warrant January 19, 1985, at or about 12:50 A.M., and was released from custody at or about 3:00 A.M. On January 24, 1985, the arresting officer prepared and signed a criminal complaint for the issuance of a summons against Defendant. Said criminal

complaint was left at the office of a district justice on the same day, for the district justice's signature. The district justice executed the complaint on the same day sometime between 1:00 P.M. and 4:30 P.M. The arresting officer did not personally appear, sign or swear to the complaint in the presence of the district justice.

With regard to the verification procedures set forth in Pa. R. Crim. Proc. 132, the subject rule provides as follows:

"Every complaint shall contain:

(9) a verification by the affiant that the facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties of Section 4904 of the Crimes Code (18 P.C.S. §4904), relating to unsworn falsification to the authorities."

The above-cited rule became effective on January 2, 1985. Prior to said date, an affiant was required to appear before the district justice and to swear to the averments in the complaint.

In the case at hand, the arresting



officer, in drawing up the complaint, used the only form available to him, to wit, the old form which was designed to comply with Rule 132 prior to the amendment of said rule. As a result, the form used in the instant case did not contain a statement that any false statements were subject to the penalties of §4904.

As discussed hereinafter, Pa. R. Crim. Proc. 134 was also amended effective January 2, 1985, and eliminated the requirement that an affiant personally appear and swear to the averments of a complaint before the district justice involved in the case. In light of the aforesaid amendment(s) it is the opinion of this Court that the absence of the verification statement in the subject complaint constitutes a procedural defect where it appears that all other provisions of the rules of criminal procedure have been complied with. In this case, the subject defect in no way affected the purpose of the rules regarding the issuance of a summons

which is to put a defendant on notice of the charges lodged against him.

In support of this conclusion, this Court relies upon Pa. R. Crim. Proc. 150 which provides as follows:

> "a defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, summons or warrant, or a defect in the procedures of this Chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The alleged defect was not raised in this case until after both the preliminary hearing and suppression hearing. Defendant was always well aware of the nature of the charges against him and he has not demonstrated any prejudice against him resulting from the complaint lodged in this case. In the opinion of this Court, Defendant's contention on this point was not timely raised and lacks sufficient merit to warrant a dismissal of the charges.

Defendant also contends that the complaint is null and void because the



averments contained in the complaint were not sworn to and subscribed by the arresting officer in the presence of the district justice.

As noted above, Pa. R. Crim. Proc. 134 was amended, effective January 2, 1985, and the requirement that an arresting officer personally appear before a district justice to swear to and subscribe his name to the averments in the complaint was entirely eliminated. As a result, this Court finds no merit in Defendant's contention on this point.

The third issue raised by Defendant's post-trial motions is: Whether certain statements made by Defendant and the results of the field sobriety tests should have been suppressed where said statements and tests preceded the Miranda warnings given top defendant.

Subsequent to Defendant's car being stopped, Officer Shallis asked Defendant where he was going. Defendant responded that he was going home. When stopped, Defendant was asked whether he had been

drinking to which he responded that he had.

Defendant's contention that these statements should have been suppressed because they were made prior to any Miranda warnings is not well-founded. The questions asked by Officer Shallis were not intended to nor expected to elicit incriminating information nor did they constitute custodial interrogation. Instead, the officer was merely seeking preliminary information after seeing Defendant's erratic driving. Such questions do not require any prior Miranda warnings. Comm. v. Davis, 460 PA. 37, 331 A.2d 406 (1975).

Defendant's statement, "You don't know who I am." was admitted into evidence over objection of counsel. This statement was not made in response to a question, but was a spontaneous utterance by Defendant. As such, the admission of the statement into evidence did not violate Defendant's right against self-incrimination. Comm. v. Bracey, 501 PA. 356, 461 A.2d 775 (1983).



With regard to the results of the field sobriety tests, the law is clear in Pennsylvania that Miranda warnings are not required before the administration of field sobriety tests because such tests are physical in nature rather than testimonial and, therefore, do not violate the right against self-incrimination. Comm v. Benson, 280 PA. Super. 20, 421 A.2d 383 (1980); Comm v. Kloch, 230 PA. Super. 563, 327 A.2d 375 (1974).

In light of all the foregoing facts and legal authorities cited, this Court has entered an Order dated the 9th day of May, 1986, dismissing Defendant's post-trial motions.

BY THE COURT:

_____
Rita E. Prescott,J.

J. 01010/87

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02176 PHILADELPHIA 1986

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby reversed and remanded. Jurisdiction relinquished.

BY THE COURT:

David A. Szewczak
Prothonotary

Dated March 30, 1987

APPENDIX "D"



COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02176 PHILADELPHIA 1986

Appeal from the Judgment of Sentence July 23, 1986 in the Court of Common Pleas of Delaware County, Criminal No. 303 of 1985.

BEFORE: CIRILLO, P.J., ROWLEY AND HOFFMAN, JJ.

OPINION BY CIRILLO, P.J.:

This is an appeal from a judgment of sentence, following a non-jury trial, for driving under the influence of alcohol and related offenses. We reverse and remand.

The issues presented for our review are: (1) whether the criminal complaint should have been dismissed due to its defects; (2) whether certain evidence was properly admitted at trial; and (3) whether the verdict was supported by sufficient evidence.

The record indicates that a patrolman stopped appellant Bruder's car after

the officer saw him pass a red light. The patrolman also witnessed what he described as Bruder's erratic driving behavior. When the policeman approached Bruder, he noticed indicia of intoxication. The patrolman testified that Bruder was unable to walk in a straight line, heel to toe, or recite the complete alphabet. Appellant was then arrested for driving under the influence of alcohol, and informed of his rights as required by Miranda v. Arizona, 384 U.S.1 436, 467-73 (1966).

I

Appellant argues that the complaint filed against him was defective and, therefore, should have been dismissed. More specifically, appellant asserts that the complaint filed in the instant case violated Pennsylvania Rules of Criminal Procedure 132 and 134.

The alleged violation by the Commonwealth of Rule 132 was its failure to include a verification with the complaint.



Rule 132(9) requires that every complaint include a "verification by the affiant that the facts set forth in the complaint are true and correct to the affiant's personal knowledge or information and belief, and that any false statements therein are made subject to the penalties . . . relating to unsworn falsification to authorities . . ."

In the case at bar, the arresting officer, in filing the complaint, used an old form which was designed to conform to an older version of Rule 132. The complaint filed in the instant case did not conform to the current version of Rule 132 because it did not contain the required clause that false statements were subject to the penalties of unsworn falsification.

The trial court found that based on Pa. R. Crim. P. 150, the defect in the complaint did not warrant dismissal of the charges. Pa. R. Crim. P. 150 provides that a "defendant shall not be discharged nor shall a case be dismissed because of a defect in the

form or content of a complaint, summons or warrant, or a defect in the procedures of this chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant."

The trial court noted that the defect concerning the absence of a verification was not raised in this case until after the preliminary hearing and suppression hearing. The trial court also observed, and we agree, that the appellant was aware of the charges against him and was not prejudiced by the defect in the complaint.

We express displeasure with the failure of the police to fully comply with the requisite form of a complaint. The plain language of Rule 150, however, does not permit us to discharge the complaint in this particular case because the defect was neither timely raised nor was it prejudicial to the appellant.

Appellant also contends that Pa.



R. Crim. 134 was violated. Rule 134 provides that in any proceeding initiated by an complaint, the issuing authority shall ascertain and certify on the complaint that there is probable cause, in the form of an affidavit, for the issuance of process.

Notwithstanding appellant's assertion to the contrary, we discern no language in the rule, or in the comments to the rule, which require the police to personally appear and verify the complaint before the district justice involved in the case. Because we find no violation of Rule 134, we cannot dismiss the complaint on this basis.

Appellant also argues that the defective complaint was a violation of Pa. R. Crim. P. 130(d). We need not address this argument due to our holding that there were no fatal defects in the instant complaint.

II

Bruder argues that certain statements that he made after he was

stopped, as well as the results of the field sobriety test, should have been suppressed.

When appellant's car was stopped, appellant stepped out and approached the police vehicle. The police officer asked appellant for his driver's license, registration and insurance card. Appellant returned to his car to obtain the requested information. After appellant had provided this information, the police officer asked appellant whether he had been drinking and appellant responded that he had. The police officer also asked appellant where he was going. Appellant responded that he was going home. Bruder argues that these responses should be suppressed because they were made before he was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 444 (1966); Berkemer v. McCarty, 468 U.S. 420, 428-29 (1984). In order to determine whether the responses made by appellant before he received his Miranda warnings should have been suppressed, we must decide whether they were



elicited during custodial interrogation.

In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court ruled that a motorist was not in custody when he was stopped by a police officer who asked "a modest number of questions and requested him to perform a simple balancing test visible to passing motorists." 468 U.S. at 442. As in the case at bar, the driver in McCarty was stopped after being suspected of driving under the influence of alcohol, admitted that he had a few drinks, and failed a balancing test before being advised of his Miranda rights. The Court in McCarty, however,a refused to adopt a bright line test which would have definitively answered the question of whether Miranda applies of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been taken into custody.

In Pennsylvania, "custodial

interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonable believes his freedom of action is being restricted." Commonwealth v. Meyer, 488 Pa. 297, 307, 412 A.2d 517, 521 (1980) (quoting Commonwealth v. Brown, 473 Pa. 562, 570, 375 A.2d 1260, 1264 (1977). Interrogation in this context is defined as questioning "'expected to elicit a confession or other incriminating statements.'". Commonwealth v. Bracey, 501 Pa. 356, 367, 461 A.2d 775, 780 (1983) (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978)).

In Commonwealth v. Meyer, supra, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait at the scene until additional police arrived, was in custody for purposes of



Miranda. The Meyer court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his Miranda warnings should have been suppressed. 488 Pa. at 307, 412 A.2d at 522. See generally Annotation, Right of Motorist Stopped by Police Officers To Be Informed at That Time of His Federal Constitutional Rights Under Miranda v. Arizona, 25 A.L.R. 3d 1076 (1969) (cases collected).

We rely on Meyer in finding that Bruder reasonably believed that his freedom of action had been restricted. Undoubtedly, he was not free to leave when he made the statements elicited. That the policeman's questions were intended to elicit incriminating statements remains obvious. We cannot readily accept an alternative reason why Bruder was asked if he had been drinking. Thus, based on the reasoning in the Meyer case, we conclude that Bruder's response that

he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of Miranda warnings. Meyer, 488 Pa. at 307, 412 A.2d at 522. See generally McCarty, 468 U.S. at 441 n.34 (United States Supreme Court cites Meyer in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was a custodial interrogation for purposes of providing Miranda warnings.) As we have established that custodial interrogation existed at the point Bruder was asked whether he had been drinking, the subsequent response concerning his destination should also have been excluded.

Bruder's statement, "You don't know who I am," was admitted into evidence over the objection of counsel. Although this statement was made before Bruder received his Miranda warnings, it was a spontaneous utterance not made in response to a question



by the police officer. In Commonwealth v. Bracey, 501 Pa. 356, 461 A.2d 775 (1983), the Pennsylvania Supreme Court ruled that a statement is admissible notwithstanding the lack of Miranda warnings if it was not given in response to police conduct which evoked an admission, or if it was freely given without compelling influences. Id. at 367, 461 A.2d at 780 (quoting Commonwealth v. Sero, 478 Pa. 440, 453, 387 A.2d 63, 70 (1978). It is clear from the record that this particular statement by Bruder was freely made in the absence of evocative police conduct. Therefore, it was properly admitted.

After appellant informed the police officer that he had had a few drinks, the police officer asked the appellant to recite the alphabet and to walk in a straight line, heel to toe. Appellant argues that these field sobriety tests should be suppressed. It is settled in Pennsylvania that "(r)equiring a driver to perform physical tests . . . does not violate the privilege against self-

incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required." Commonwealth va. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980).

Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387. "Testimonial evidence is communicative evidence as distinguished from demonstrative or physical evidence." Commonwealth v. Fernandez, 333 Pa. Super. 279, 284, 482 A.2d 567, 569 (1984).

We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was



elicited before Bruder received his Miranda warnings, it should have been excluded as evidence. Benson, 280 Pa. Super. at 29, 421 A.2d at 387 (citing United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966)). See Miranda, 384 U.S. at 479.

In order to reverse on the basis of the introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence. Commonwealth v. Sweger, 351 Pa. Super. 188, 195, 505 A.2d 331, 334 (1986) (citing Lewis v. Prewitt, 337 Pa. Super. 419, 487 A.2d 16 (1985)). See also Commonwealth v. Smoyer, 505 Pa. 83, 88, 476 A.2d 1304, 1307 (1984) (effect of tainted evidence); Commonwealth v. Johnson, 227 Pa. Super. 96, 102-03, 323 A.2d 813, 816 (1974) (same).

Based on our analysis which determined that evidence obtained during Bruder's custodial interrogation was

inadmissible, we hold that it was an abuse of discretion to admit such evidence. Introduction of the tainted evidence was clearly prejudicial to Bruder because the absence of such evidence might very well have led to a different verdict. Thus, we must reverse and remand for proceedings consistent with this opinion. 1

Reversed and remanded. Jurisdiction relinquished.

ROWLEY, J. FILES A CONCURRING AND DISSENTING STATEMENT

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1 This disposition precludes the need to address the remaining issue.



COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 2176 Philadelphia, 1986

Appeal from the Judgment of Sentence July 23, 1986, in the Court of Common Pleas of Delaware County, Criminal Division, No. 303 of 1985.

BEFORE: CIRILLO, P.M., ROWLEY, and HOFFMAN, JJ.

CONCURRING AND DISSENTING STATEMENT BY ROWLEY, J.:

While I agree with the majority's disposition of the issue concerning dismissal of the criminal complaint, I respectfully disagree with the conclusion that appellant's statements should have been suppressed under Commonwealth v. Meyer, 488 Pa. 297, 412 A.2d 517 (1980). I think that Meyer is distinguishable on its facts and that the facts in this case closely parallel those in Berkemer v. McCarty, 468 U.S. 420 (1984). Considering

also that the U.S. Supreme Court cited Meyer, as an example of the confusion among various jurisdictions in applying Miranda v. Arizona, 384 U.S. 436 (1966) to situations involving motorists stopped for traffic violations, I think that Berkemer is controlling in this case.

Because I think that the trial court has also adequately discussed and correctly decided appellant's issue concerning the sufficiency of the evidence, I would affirm the judgment of sentence.



COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS A. BRUDER, JR.,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 2176 Philadelphia, 1986

ORDER OF COURT

AND NOW, this 8th day of June, 1987, the petition for reargument is denied. However, panel reconsideration is granted on the limited issue of the sufficiency of the evidence.

Per Curian

APPENDIX "F"

# Supreme Court of Pennsylvania

MARLENE F. LACHMAN, Esq.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

## Eastern District

468 CITY HALL
PHILADELPHIA, PA 19107
[redacted]
(215) 560-6370

May 19, 1988

Joseph J. Mittleman, Esquire
John A. Reilly, Esquire
Sandra L. Elias, Esquire
DISTRICT ATTORNEY'S OFFICE
Delaware County Court House
Media, Pa. 19063

RE: Commonwealth of Pennsylvania, Petitioner v.
Thomas A. Bruder, Jr.
No. 650 E.D. Allocatur Docket 1987

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"May 19, 1988.

DENIED.

Per Curiam".

Very truly yours,

Patrick Tassos

PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Stuart Suss, Esquire
Carmen P. Belefonte, Esquire

APPENDIX "F"

(2)

No. 88-161

In The

# Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

vs.

THOMAS A. BRUDER, JR.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether compelling a motorist to recite the alphabet for the purpose of producing testimonial or communicative evidence to determine guilt without any warnings of the individual's rights against self-incrimination is violative of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a motorist who reasonably believes his freedom of action is being restricted by a police interrogation must be warned of his rights against self-incrimination pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS





TABLE OF AUTHORITIES

## OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the Petitioner's presentation of the opinions below and grounds on which they seek to invoke the jurisdiction of this Court.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent is satisfied that Petitioner has set forth the applicable constitutional provisions involved.

## STATEMENT OF CASE

On January 19, 1985, at approximately 12:50 a.m., Patrolman Steve Shallis of the Newtown Township Police Department observed the Respondent's vehicle momentarily stopped at a green light. (N.T. December 17, 1985, p.8) Thereafter, Respondent proceeded down a four-lane highway. Respondent then made a right-hand turn onto a two lane road. While on the two lane road, Patrolman Shallis activated the red grill lights and the red dash light of his police vehicle. In response thereto, Respondent stopped his vehicle on the shouler of the road. (*Id.* at 11-12) In response to Patrolman Shallis, Respondent produced his driver's license. While Respondent was looking for his registration card within his glove compartment, Patrolman Shallis demanded Respondent step out of his vehicle. Patrolman Shallis then pointedly asked the Respondent whether he had consumed any alcoholic beverages. In response thereto, Respondent stating he "had a couple of drinks". (*Id.* at 14)

Respondent was then ordered by Patrolman Shallis to undergo field sobriety tests in the form of a walk-the-line and alphabet recitation test. (*Id.* at 14-15) Patrolman Shallis then placed Respondent under arrest for operating a vehicle under the influence of alcohol and/or a controlled substance. Thereafter, Respondent was placed into the back of a marked Newtown Township Police Vehicle and read his *Miranda* rights for the first time. (*Id.* at 16)

Respondent concurs with Petitioner's recitation of the procedural history of this case.

## REASONS FOR DENYING REVIEW ON CERTIORARI

### I. COMPELLING A MOTORIST TO RECITE THE ALPHABET FOR THE PURPOSE OF PRODUCING TESTIMONIAL OR COMMUNICATIVE EVIDENCE TO DETERMINE HIS GUILT WITHOUT ANY WARNINGS OF HIS RIGHTS AGAINST SELF-INCRIMINATION VIOLATES THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The conclusion within the Petition that the Pennsylvania Superior Court's decision in *Commonwealth v. Bruder*, 365 Pa. Super. Ct. 106, 528 A.2d 1385 (1987) is in direct conflict with the decisions of *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed. 2d 67 (1973), *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967) and *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966) is illusory. The decisions in *Dionisio*, *Wade*, and *Schmerber* are clearly distinguishable from the instant case and are not applicable to



custodial interrogations when testimonial or communicative evidence is obtained therefrom. The *Wade* decision addressed certain legal issues surrounding a post-indictment line-up, the *Dionisio* decision reviewed the legal issue of the use of a Grand Jury subpoena to obtain a voice exemplar to compare with recorded conversations that had been received by the Grand Jury into evidence, and the *Schmerber* decision involved the withdrawal of blood from a suspect and the admission of the blood analysis into evidence.

In *Wade*, this Court concluded that the defendant was entitled to counsel at a pre-trial line-up since it was a critical stage of the prosecution. In order to avoid the great potential for prejudice and protect against over-reaching, either intentional or unintentional, during the line-up process, the defendant's rights were to be insured by the right to have counsel during the line-up. This Court further concluded in *Wade*, the defendant's rights under the Fifth Amendment were not violated when he had to utter words for purposes of identifying his voice. The Court was emphatic in concluding that the compulsion to utter statements were *not* of statements that were testimonial in nature. Such statements were not introduced into evidence against him. Specifically, this Court in its holding concluded:

> Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the line-up which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the line-up proceedings on Wade's cross-examination of the bank employee involved no violation of Wade's privilege. 388 U.S. at 223.

In the instant case, the Respondent's utterances of the alphabet were testimonial in nature and were in fact admitted into evidence to demonstrate what he said and did implicating his privilege. The defendant's actual communications spoke of his guilt when he recited the alphabet.

In *Dionisio*, the witness was compelled to produce a voice exemplar. However, this procedure was cloaked with the presence of counsel to assure the integrity of the process for obtaining his voice exemplar. Additionally, the statements were made only for purposes of voice comparisons; *the voice exemplars were not going to be introduced into evidence.* As stated by this Court: "the voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for testimonial or communicative content of what was to be said." 410 U.S. at 7

In *Schmerber*, this Court held that withdrawal of blood from a defendant and the admission of the blood analysis into evidence did not violate the defendant's rights against self-incrimination. This Court, in its analysis of the Privilege Against Self-Incrimination Claim, concluded:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privileged grounds. 384 U.S. at 765.

This Court in *Schmerber* reaffirmed that "the protection of the privilege reaches an accused's communication, whatever form they might take, and the compulsion of



responses which are also communications." 384 U.S. at 763-764.

The privilege against self-incrimination is "a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect an accused the source of 'real or physical evidence' does not violate it". 384 U.S. at 764.

This Court noted the difficulty in determining whether evidence is communicative or testimonial versus real or physical evidence and that a distinction must be drawn in an analysis of the evidence being obtained from a defendant. This Court observed:

> Some tests seemingly directed to obtain 'physical evidence', for example lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. *To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.* (Emphasis Added.) 384 U.S. at 764.

In *Schmerber* there was no testimonial compulsion at all involved in the extraction of blood from the defendant.

It is submitted that both *Wade* and *Dionisio* are clearly distinguishable in that the testimonial or communicative content of the individuals' statements in both cases was not itself introduced into evidence. In *Schmerber*, there was in fact no statements made by the defendant. In the instant case, the Petitioner, to establish the defendant's guilt introduced into evidence the testimonial or communicative content of what the Respondent stated in reciting

the alphabet. More importantly, Respondent was not afforded the right to counsel.

Reciting the alphabet was not a test designed to elicit real or physical evidence to be introduced against the defendant. Rather, the recitation of the alphabet was clearly communicative and testimonial by its very nature and the content of said statement was introduced into evidence to be considered as evidence in determining the defendant's guilt or innocence.

The jury in the *Bruder* case was hearing utterances of the defendant and how he recited the alphabet and other utterances during the recitation of the alphabet which were being weighed by the jury to determine his guilt or innocence and not merely to determine, in the form of a test, whether his faculties were impaired, such as observing him walk. The introduction of the utterances of Respondent was not "physical evidence", it was in fact testimonial by its very nature.

The Superior Court of Pennsylvania concluded that under Pennsylvania Law in the instant case the recitation of the alphabet was communicative or testimonial in nature.

## II. A MOTORIST WHO REASONABLY BELIEVES HIS FREEDOM OF ACTION IS BEING RESTRICTED BY POLICE INTERROGATION MUST BE WARNED OF HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Pennsylvania Superior Court correctly concluded that the roadside questioning of a motorist



detained pursuant to a traffic stop constitutes custodial interrogation, for the purposes of the *Miranda* Rule, if the motorist is physically deprived of his freedom in any significant way, or is placed in a situation in which he reasonably believes his freedom of movement is restricted by such interrogation. This conclusion is in harmony with *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984), wherein this Court held the following:

> If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protection prescribed by *Miranda*. 468 U.S. at 335.

*Commonwealth v. Meyer*, 488 Pa. 297, 412 A.2d 517 (1980) was properly relied upon by the Superior Court of Pennsylvania for the legal proposition that the roadside questioning of a motorist detained pursuant to a traffic stop constitutes custodial interrogation, for the purposes of the *Miranda* Rule, if the motorist reasonably believes that his freedom of action is restricted by such interrogation. *Commonwealth v. Meyer, supra* at 521. As correctly decided by the Superior Court in both the case at bar and in *Meyer, supra*, the evidence clearly indicated that the motorist reasonably believed his freedom of action had been restricted and statements elicited before he received his *Miranda* warnings were properly suppressed. The Superior Court correctly observed that this Court has recognized the validity of the *Meyer* decision in its analysis of the facts in *Berkemer v. McCarty, supra* at 441, N.34. Specifically, the Superior Court concluded:

> As in the case at bar, the driver in *McCarty* was stopped after being suspected of driving under the

influence of alcohol, admitted that he had had a few drinks, and failed a balancing test before being advised of his *Miranda* rights. The Court in *McCarty*, however, refused to adopt a bright line test which would have definitively answered the question of whether *Miranda* applied to all traffic stops or whether a suspect need be advised of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been taken into custody

. . . .

[W]e conclude that Bruder's response that he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of *Miranda* warnings. *Meyer*, 488 Pa. at 307, 412 A.2d at 522. *See generally McCarty*, 468 U.S. at 441 N.34 (United States Supreme Court cites *Meyer* in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was custodial interrogation for purposes of providing *Miranda* warnings).

528 A.2d at 1387-1388.

Based on the foregoing, the reasoning and ultimate holding of the Superior Court in the instant case is in harmony with the United States Supreme Court's decision in *Berkemer v. McCarty, supra, and* the Pennsylvania Supreme Court's decision in *Commonwealth v. Meyer, supra.*

Contrary to the Petitioner's conclusion, it is submitted that the Pennsylvania Superior Court followed the rationale of *Berkemer v. McCarty*, when it stated that the Supreme Court of the United States refused to adopt a bright line test which would have definitively answered



the question of whether *Miranda* applied to all traffic stops or whether a suspect need be advised of his rights only when he is formally placed under arrest. Accordingly, the Superior Court concluded:

> "In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted.' (Citations omitted)" *Commonwealth v. Bruder*, 528 A.2d at 1387.

The Superior Court relied on a line of Pennsylvania cases interpreting and defining the meaning of custodial interrogation. Since this Court has left to the State Courts the opportunity to define custodial interrogation for purposes of *Miranda*, it is submitted that this Court should not redefine custodial interrogation for the State of Pennsylvania, unless this Court wishes to conclude that the application of *Miranda* does not apply to traffic stops or unless a suspect is formally placed under arrest.

## CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for a Writ of Certiorari to the Pennsylvania Supreme Court be denied.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA *v.* THOMAS A. BRUDER, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

No. 88–161. Decided October 31, 1988

PER CURIAM.

Because the decision of the Pennsylvania Superior Court in this case is contrary to *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), we grant the petition for a writ of certiorari and reverse.

In the early morning of January 19, 1985, Officer Steve Shallis of the Newton Township, Pennsylvania, Police Department observed Bruder driving very erratically along State Highway 252. Among other traffic violations, he ignored a red light. Shallis stopped Bruder's vehicle. Bruder left his vehicle, approached Shallis, and when asked for his registration card, returned to his car to obtain it. Smelling alcohol and observing Bruder's stumbling movements, Shallis administered field sobriety tests, including asking Bruder to recite the alphabet. Shallis also inquired about alcohol. Bruder answered that he had been drinking and was returning home. Bruder failed the sobriety tests, whereupon Shallis arrested him, placed him in the police car and gave him *Miranda* warnings. Bruder was later convicted of driving under the influence of alcohol. At his trial, his statements and conduct prior to his arrest were admitted into evidence. On appeal, the Pennsylvania Superior Court reversed, 365 Pa. Super. 106, 528 A. 2d 1385 (1987), on the ground that the above statements Bruder had uttered during the roadside questioning were elicited through custodial interrogation and should have been suppressed for lack of *Miranda* warnings. The Pennsylvania Supreme Court denied the State's appeal application.

In *Berkemer* v. *McCarty*, *supra*, which involved facts strikingly similar to those in this case, the Court concluded that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.*, at 440. The Court reasoned that although the stop was unquestionably a seizure within the meaning of the Fourth Amendment, such traffic stops typically are brief, unlike a prolonged station house interrogation. Second, the Court emphasized that traffic stops commonly occur in the "public view," in an atmosphere far "less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself." *Id.*, at 438–439. The detained motorist's "freedom of action [was not] curtailed to 'a degree associated with formal arrest.'" *Id.*, at 440 (citing *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983).) Accordingly, he was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning were admissible.[1]

The facts in this record, which Bruder does not contest, reveal the same noncoercive aspects as the *Berkemer* detention: "a single police officer ask[ing] respondent a modest number of questions and request[ing] him to perform a simple balancing test at a location visible to passing motorists." 468 U. S., at 442 (footnote omitted).[2] Accordingly,

---

[1] We did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not "delay formally arresting detained motorists, and . . . subject them to sustained and intimidating interrogation at the scene of their initial detention." *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984).

[2] Reliance on the Pennsylvania Supreme Court's decision *Commonwealth* v. *Meyer*, 488 Pa. 297, 412 A. 2d 517 (1980), to which we referred in *Berkemer*, see 468 U. S., at 441, and n. 34, is inapposite. *Meyer* involved facts which we implied might properly remove its result from *Berkemer*'s application to ordinary traffic stops; specifically, the motorist in *Meyer* could be found to have been placed in custody for purposes of *Miranda* safeguards because he was detained for over one-half an hour, and subjected to questioning while in the patrol car. Thus, we acknowledged

*Berkemer*'s rule, that ordinary traffic stops do not involve custody for purposes of *Miranda*, governs this case.[1] The judgment of the Pennsylvania Superior Court that evidence was inadmissible for lack of *Miranda* warnings is reversed.

---

*Meyer*'s relevance to the unusual traffic stop that involves prolonged detention. We expressly disapproved, however, the attempt to extrapolate from this sensitivity to uncommon detention circumstances any general proposition that custody exists whenever motorists think that their freedom of action has been restricted, for such a rationale would eviscerate *Berkemer* altogether. See *Berkemer*, *supra*, 436–437.

[1] We thus do not reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

# SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA *v.* THOMAS A. BRUDER, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

No. 88-161. Decided October 31, 1988

JUSTICE MARSHALL, dissenting.

I agree with JUSTICE STEVENS that the Court should not disturb the decision of the court below, and accordingly I join his dissent. I write separately to note my continuing belief that it is unfair to litigants and damaging to the integrity and accuracy of this Court's decisions to reverse a decision summarily without the benefit of full briefing on the merits of the question decided. *Rhodes* v. *Stewart*, —— U. S. ——, —— (1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships*, 485 U. S. —— (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. ——, —— (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the decision below.

# SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA *v.* THOMAS A. BRUDER, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

No. 88-161. Decided October 31, 1988

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court explains why it reverses the decision of the Superior Court of Pennsylvania in this drunk driving case, but it does not explain why it granted certiorari.

In *Berkemer* v. *McCarty*, 468 U. S. 420, 440–442 (1984), the Court concluded that *Miranda* warnings are not required during a traffic stop unless the citizen is taken into custody; that there is no bright-line rule for determining when detentions short of formal arrest constitute custody; and that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation," *id.*, at 442. The rule applied in Pennsylvania is strikingly similar to this Court's statement in *Berkemer*. As the Pennsylvania Superior Court explained in this case:

> "In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted.' *Commonwealth* v. *Meyer*, 488 Pa. 297, 307, 412 A. 2d 517, 521 (1980) (quoting *Commonwealth* v. *Brown*, 473 Pa. 562, 570, 375 A. 2d 1260, 1264 (1977). . . .
>
> "In *Commonwealth* v. *Meyer*, the Pennsylvania Supreme Court ruled that the driver of a car involved in an accident who was suspected of driving under the influence of alcohol and who was told by police to wait at the scene until additional police arrived was in custody for

> purposes of *Miranda*. The *Meyer* court reasoned that because the defendant had a reasonable belief that his freedom of action had been restricted, statements elicited before he received his *Miranda* warnings should have been suppressed. 488 Pa. at 307, 412 A. 2d at 522." 365 Pa. Super. 106, 111–112, 528 A. 2d 1385, 1387 (1987).

In its *Berkemer* opinion, this Court cited the Pennsylvania Supreme Court's opinion in *Commonwealth* v. *Meyer*, 488 Pa. 297, 412 A. 2d 517 (1980), with approval. 468 U. S., at 441, n. 34. Thus, there appears to be no significant difference between the rule of law that is generally applied to traffic stops in Pennsylvania and the rule that this Court would approve in other states.

There is, however, a difference of opinion on the question whether the rule was correctly applied in this case. The Superior Court of Pennsylvania was divided on the issue. See 365 Pa. Super., at 117, 528 A. 2d, at 1390 (Rowley, J., concurring and dissenting). It was therefore quite appropriate for the prosecutor to seek review in the Supreme Court of Pennsylvania. That court summarily denied review without opinion. See App. to Pet. for Cert. 64a. That action was quite appropriate for the highest court of a large state like Pennsylvania because such a court is obviously much too busy to review every arguable misapplication of settled law in cases of this kind.

For reasons that are unclear to me, however, this Court seems to welcome the opportunity to perform an error-correcting function in cases that do not merit the attention of the highest court of a sovereign state. See, *e. g.*, *Florida* v. *Meyers*, 466 U. S. 380 (1984) *(per curiam)*; *Illinois* v. *Batchelder*, 463 U. S. 1112 (1983) *(per curiam)*. Although there are cases in which "there are special and important reasons" for correcting an error that is committed by another court, see this Court's Rule 17.1, this surely is not such a case. The Court does not suggest that this case involves an

important and unsettled question of federal law or that there is confusion among the state and federal courts concerning what legal rules govern the application of *Miranda* to ordinary traffic stops. Rather, the Court simply holds that the Superior Court of Pennsylvania misapplied our decision in *Berkemer* to "[t]he facts in this record." *Ante*, at 2. In my judgment this Court's scarce resources would be far better spent addressing cases that are of some general importance "beyond the facts and parties involved," *Boag* v. *MacDougall*, 454 U. S. 364, 368 (1982) (REHNQUIST, J., dissenting), than in our acting as "self-appointed . . . supervisors of the administration of justice in the state judicial system," *Florida* v. *Meyers*, 466 U. S., at 385 (STEVENS, J., dissenting).

Accordingly, because I would not disturb the decision of the Supreme Court of Pennsylvania—which, incidentally, is the court to which the petitioner asks us to direct the writ of certiorari—I respectfully dissent.